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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

REGINALD TYRONE LEWIS,

Defendant and Appellant.

H033033

(Santa Clara County

Super. Ct. Nos. B9945355, 203061)

In 2000, as part of a negotiated no contest plea to charges involving sexual offenses against a minor, defendant Reginald Tyrone Lewis was ordered to register as a sex offender under the mandatory registration requirements set forth in Penal Code section 290.<sup>1</sup> After a new criminal complaint was filed against him for failing to update his sex offender registration, Lewis successfully moved to dismiss that complaint, and the trial court vacated his mandatory registration requirement as unlawful under *People v. Hofsheier* (2006) 37 Cal.4th 1185. The trial court then ordered Lewis to register as a sex offender under the discretionary provision of section 290.006.

On appeal, Lewis contends that the trial court lacked jurisdiction to order him to register as a sexual offender under section 290.006.

We agree and therefore shall reverse.

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<sup>1</sup> All further statutory references are to the Penal Code.

## **I. FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>**

“Fifteen-year-old Christina S. met thirty-six-year-old defendant [Lewis] in August 1996. The two began having sex two weeks later. Christina did not get along with her parents, who were separated. She moved in with defendant in October. In May 1997, Christina contacted the police and told of the relationship with defendant and that it had resulted in her pregnancy.” (*Lewis I, supra*, H021048 [at p. 2].) In connection with these offenses, “Lewis entered a negotiated no contest plea to unlawful sexual intercourse with a minor more than three years younger (Pen. Code, § 261.5, subd. (c)), penetration by a foreign object on a minor (Pen. Code, § 289, subd. (h)), and oral copulation with a minor (Pen. Code, § 288a, subd. (b)). [In November 1998,] [t]he trial court suspended imposition of sentence and placed defendant on three years probation on condition, among others, that he serve eight months in jail.” (*Id.* [at p. 1].)

“In December 1998, defendant began an Internet chat room correspondence with 16-year-old Elizabeth R., a Missouri resident. In June 1999, he sent her a plane ticket to San Jose, but she used it to go to Phoenix and live with her sister. But Elizabeth contacted defendant from Phoenix, and defendant sent her a plane ticket to San Jose. In July, Elizabeth arrived in San Jose and spent 11 days with defendant engaging in various sexual activities. Police arrested defendant after being contacted by Elizabeth’s sister who was concerned about her safety.” (*Lewis I, supra*, H021048 [at p. 2].) The trial court found that, by committing the offenses against Elizabeth R., Lewis had violated probation and had also failed to register as a sex offender. (*Id.* [at p. 1].) Consequently, the trial court revoked Lewis’s probation in the Christina S. case and sentenced him to the

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<sup>2</sup> Our recitation of certain factual and procedural aspects of this case is taken from our nonpublished opinion in *People v. Lewis* ((Aug. 28, 2001) H021048 (*Lewis I*)), of which we take judicial notice.

aggravated term of three years for the unlawful sexual intercourse count and to consecutive eight-month terms for the other two counts. (*Ibid.*)

With respect to the offenses involving Elizabeth R., Lewis was separately charged with seven counts of unlawful sexual intercourse with a minor more than three years younger than himself (§ 261.5, subd. (c)), three counts of oral copulation with a minor (§ 288a, subd. (b)(1)) and two counts of failing to register as a sex offender (former § 290, subd. (g)(2)). On September 13, 2000, Lewis pleaded guilty or no contest to all 12 counts, and was sentenced to a total of two years in prison,<sup>3</sup> consecutive to the term imposed for violating probation.

In *Lewis I*, we found that the trial court improperly relied on Lewis's postprobation conduct as a factor in aggravation and remanded for resentencing on the offenses involving Christina S.<sup>4</sup> (*Lewis I, supra*, H021048 [at p. 9].) On December 10, 2001, Lewis was resentenced to a term of three years and four months in prison, consisting of the middle term of two years for the unlawful sexual intercourse count and consecutive eight-month (one-third the mid-term) terms for the other two counts. Including the consecutive two year term for the offenses involving Elizabeth R., Lewis's total sentence was five years and four months. Lewis did not appeal this sentence.

Most recently, Lewis was charged by complaint in Santa Clara County Superior Court case No. CC508113 with failing to update his sexual offender registration.<sup>5</sup> On

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<sup>3</sup> The two year sentence consisted of the middle term of eight months on three separate counts, i.e., one count of unlawful sexual intercourse with a minor more than three years younger (§ 261.5, subd. (c)), one count of oral copulation with a minor (§ 288a, subd. (b)(1)) and one count of failure to register as a sex offender (former § 290, subd. (g)(2)). On each of the remaining nine counts, Lewis received a concurrent term of two years.

<sup>4</sup> In *Lewis I*, Lewis did not challenge the consecutive two year sentence he received for the offenses involving Elizabeth R.

<sup>5</sup> The criminal complaint in case No. CC508113 was not included in the record on appeal.

May 7, 2008, Lewis, through appointed counsel, filed a motion to dismiss the complaint, arguing that pursuant to *Hofsheier*, he is not a “person required to register under Penal Code section 290.” Instead, “his prior conviction offenses are all discretionary registration offenses, which require that findings and reasons supporting sex registration are placed on the record before registration may be imposed.” According to Lewis’s motion, since those findings and reasons were not made when he was originally sentenced in 2000, he was under no obligation to register and thus could not be charged with failure to register.

After the People conceded the issue, the trial court granted Lewis’s motion, but indicated that it was retaining jurisdiction to determine if it had jurisdiction over Lewis to consider whether to impose a discretionary registration requirement in place of the mandatory registration requirement. If the trial court found that it had such jurisdiction, it would then determine whether or not discretionary registration was appropriate under section 290.006.

At a hearing on May 9, 2008, the trial court ruled that it had jurisdiction over Lewis despite having granted his motion to dismiss, and would consider whether or not discretionary registration was warranted under section 290.006. After finding that Lewis committed the offenses involving Christina S. and Elizabeth R. because of sexual compulsion or for the purpose of sexual gratification and that his conduct was “predatory in nature,” the trial court ordered Lewis to register as a sex offender under the discretionary provisions of section 290.006.

Lewis timely appealed.

## II. DISCUSSION

Lewis argues, citing our recent opinion in *Lewis v. Superior Court* (2008) 169 Cal.App.4th 70 (*Lewis*),<sup>6</sup> that the trial court lacked jurisdiction to impose discretionary registration under section 290.006. Once the trial court dismissed the recent complaint for failure to update his registration, there was no longer any case or proceeding pending before it, and it could therefore not entertain a motion by the People<sup>7</sup> to order him to register as a sex offender under the discretionary provisions of section 290.006. The judgment against him was final in 2000, when he was originally sentenced, and the trial court had no authority to resentence him.

In *Lewis*, the defendant was convicted by a jury in 1987 of two counts of oral copulation with a minor under the age of 18 (§ 288a, subd. (b)(1)), was placed on probation and ordered to register as a sex offender pursuant to section 290. (*Lewis*, *supra*, 169 Cal.App.4th at p. 73.) In 2007, citing *Hofsheier*, the defendant filed a motion in the superior court seeking to set aside the mandatory registration requirement. (*Id.* at p. 75.) The superior court denied the motion, but ordered the defendant to register as a sex offender under the discretionary registration provisions of section 290.006. (*Lewis*, *supra*, at p. 75.) On appeal, this court initially questioned whether or not the superior court could properly entertain the defendant's motion in the first place, given that his case had long been final and there was no proceeding to which the motion would be related. (*Id.* at pp. 76-77.) Ultimately, we treated the appeal as a petition for writ of mandate, and

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<sup>6</sup> By coincidence, the defendant in *Lewis* shares the same last name as the defendant herein.

<sup>7</sup> At oral argument, the People contended that Lewis's 2008 motion to dismiss was, in essence, an attempt to modify his original sentence in case Nos. B9945355 and 203061 and thus Lewis invited the trial court to assume jurisdiction over him under his original sentence. As this argument was not raised in the People's brief, we do not consider it. (*New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.* (1992) 7 Cal.App.4th 1088, 1098.)

after determining that there was no evidence to support the findings necessary to require defendant to register under section 290.006, we directed the superior court to enter a new order relieving defendant of the duty to register as a sex offender. (*Lewis, supra*, at pp. 78-80.)

Here, unlike the defendant in *Lewis*, Lewis did not bring a motion, let alone a petition for writ of mandate, to set aside his mandatory registration requirement. His motion to dismiss the recent criminal complaint for failing to register did not operate as a mechanism by which the trial court could reassert its jurisdiction over him under his original sentence. His motion was related to the current criminal proceedings *only*. Once execution of a sentence has begun, the trial court is without jurisdiction to resentence a defendant. (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1424.)<sup>8</sup> Lewis's original sentence was imposed in 2000, he was resentenced on remand in 2001, and there was no basis for the trial court, in 2008, to reopen those proceedings and resentence him on those charges. As a consequence, once the criminal complaint in case No. CC508113 was dismissed, the court no longer had jurisdiction over Lewis.

### **III. DISPOSITION**

The May 9, 2008 order finding that the court had jurisdiction over Lewis and the May 19, 2008 order vacating mandatory registration under Penal Code section 290 and imposing discretionary registration under Penal Code section 290.006 are reversed.

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<sup>8</sup> We note that the Supreme Court has before it a case raising the question of whether, after a judgment is final, a superior court has jurisdiction to rule on a motion to vacate an order requiring a defendant to register as a sex offender. (*People v. Picklesimer*, review granted Oct. 16, 2008, S165680.)

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Premo, Acting P.J.

WE CONCUR:

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Elia, J.

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Mihara, J.